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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1536

ANDREW P. HART AND
KIRBY LUMBER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Andrew P. Hart ("Hart") and Kirby Lumber Corporation (name changed after trial to Kirby Forest Industries, Inc., and herein referred to as "Kirby") respectfully request that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 11, 1978.

OPINIONS BELOW

This opinion of the Court of Appeals (Appendix I, page 29, post) has been reported at 585 F.2d 1280.

The Findings of Fact and Conclusions of Law of the District Court for the Eastern District of Texas (Appendix II, page 39, post) have not been published. The judgment of the Court of Appeals was entered on December 11, 1978. Petition for rehearing, filed on or about December 26, 1978, was overruled on January 11, 1979.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

1. Does the Quiet Title Act 28 U.S.C. §§ 1346(f), 1402(d) and 2409a (1970), 86 Stat. 1176 (1972), either alone or together with Section 10 of the Administrative Procedure Act, as amended, 5 U.S.C. §§ 702, 703 (1970), 90 Stat. 2721 (1976), authorize suit against the United States to reform a deed to the United States granting lands under threat of condemnation for the purpose of a flood control project, based upon allegations of mutual mistakes, together with false representations by the Corps of Engineers concerning the description of the land to be conveyed?

2. In the light of Congressional intent expressed in the Quiet Title Act, 28 U.S.C. §§1346(f), 1402 and 2409a (1970), and in the Administrative Procedure Act, 5 U.S.C. §§701-706 (1970), particularly considering the 1976 Amendment of the latter statute, 5 U.S.C. § 702, should such statutes which waive immunity of the United States from suit be construed strictly in favor of the sovereign?

3. Is a suit for reformation barred as a matter of law under 28 U.S.C. § 2409a(f) (1970), as amended (the Quiet Title Act), providing for a twelve year statute of limitations, where the deed containing an erroneous description was dated more than twelve years prior to suit, but where the plaintiff neither knew nor should have known of the "claim of the United States" based upon the erroneous description until less than two years prior to suit?

STATUTES AND REGULATIONS INVOLVED

This case involves the construction of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, as amended, and particularly § 702, as amended, and the Quiet Title Act, 28 U.S.C. §§ 1346(f), 1402 and 2409a. The pertinent provisions of such statutes are quoted in Appendices III, IV and V, post, pages 50, 54, and 57. The official guidelines for the agency action complained of herein are found in *Joint Policy on Land Acquisition on Reservoir Projects; Department of the Interior—Department of the Army*, 19 Fed. Reg. 381 (1954) also quoted in Appendix VI, post, page 60.

STATEMENT OF THE CASE

On March 28, 1961, Kirby deeded land to the United States, under threat of condemnation, for use in connection with the Sam Rayburn Reservoir and Dam, a flood control project on the Angelina River in Texas authorized by the Act of March 2, 1945, 59 Stat. 10 (1945).[1]

The description in such deed was based upon Corps of Engineers surveys intending to encompass all land in

1. For additional background, see *United States v. 62.17 Acres of Land in Jasper County, Texas*, 538 F.2d 670 (5th Cir. 1976).

the tract here involved up to the 179-foot level. Acquisition to that level departed from the normal Corps policy to acquire only to the 171-foot level because, as represented at the time by the Corps, acquisition to the higher level was necessary, in view of possible erosion, where steep banks existed along the lower level. The deed in fact described lands *above* the 179 foot level, and there were no steep banks along the 171-foot level to justify the Corps' representation as to the necessity for taking to the 179-foot level. Thus, over 90 acres of land were included in the description by virtue of two mutual mistakes: (1) the actual location on the ground of the 179-foot level and (2) the nonexistence of steep bluffs on the land in question at or about the 171-foot level. The actual facts were not determined until after Kirby, in 1973, conveyed 13 acres to Hart, who discovered the surveying errors. Kirby then surveyed and confirmed the egregious errors in the Corps' surveys.

After the Corps refused to rectify the errors, suit was filed on March 28, 1975 for reformation, with federal jurisdiction being based upon 28 U.S.C. § 1346.

The District Court found the existence of mutual mistakes and reformed, giving the government fee title to the 171-foot level and a flowage easement between that line and the 179-foot level, in accordance with original acquisition policy.

The Court of Appeals reversed and remanded with instructions to dismiss, holding that as a matter of law, Kirby knew of the claim of the United States [See 28 U.S.C. § 2409a(f)] on the date of the 1961 deed, more than twelve years prior to suit.

REASONS FOR GRANTING WRIT

The questions here presented involve important questions of Federal law of great significance to the citizens of this Nation. The basic principle at issue here is access to the Federal Courts in actions against the Federal Government. In the light of increased accountability of the agents and agencies of the Federal Government, as signified by continued condemnation of the unjust anachronism that is the doctrine of sovereign immunity, particularly as the inroads upon such doctrine are evidenced by the Quiet Title Act and the 1976 Amendment to the Administrative Procedure Act, this case gives this Honorable Court its initial opportunity to construe such statutes together and thus to examine the present scope of sovereign immunity as related to equitable actions against the United States involving land, following in natural progression this Court's construction of the 1976 Amendment in *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

Perhaps more important, opportunity is given to the Court to review the heretofore and here applied rule that statutes waiving sovereign immunity must be strictly construed in favor of the sovereign. In the light of the statutes here under review, particularly the 1976 Amendment to the Administrative Procedure Act, it would seem clear that continued application of such rule is as out of date at continued obeisance to the sovereign immunity doctrine itself.

Finally, presented here is the first impression question of the proper construction of the statute of limitations provided for in the Quiet Title Act, in which the definition of the phrase "claim of the United States" should be determined in the context here presented.

1. The Significance of The 1976 Amendment

The importance of the 1976 Amendment cannot be understated. It is a milestone in the effort to eliminate the harshness of the sovereign immunity doctrine, and thus to ensure that the instruments of government are accountable to the people by providing for *merit* determination of controversies. The Amendment, as demonstrated by its legislative history, [1976] U.S. Code Cong. & Ad. News 6121, (94th Cong., 2d Sess.) makes clear that the doctrine has been narrowed to the smallest vestige generally and has been *eliminated* entirely where *equitable* actions are brought against the Federal Government.[2]

The legislative history also makes clear that the time has come to reverse the narrow, restrictive interpretations heretofore imposed upon enactments which provide access to the courts. The hallmark today is accountability and not unjust and arbitrary restrictions on merit determinations and not, once the merits are under review, to limit such review by standards which restrict such accountability.

The following excerpts from the legislative history exemplify the foregoing conclusions:

> The amendment made to section 702 of title 5 would *eliminate* the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency.

Id. at 6123 (emphasis supplied).

* * *

2. The only limitation remaining with regard to equitable actions is proper subject matter jurisdiction, as determined by this Court in *Califano v. Sanders*, cited in the text above.

> Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens by passing the Tucker Act of 1875, 28 U.S.C. sections 1346, 1491 and the Federal Tort Claims Act of 1946, 28 U.S.C. section 1346(b). S.800 would *strengthen this accountability* by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus.

Id. at 6124 (emphasis supplied, footnote omitted).

> Based on the testimony presented to this committee and to the Senate committee, it appears that the consensus in the administrative law community among scholars and practitioners is strong with regard to the elimination of sovereign immunity.

Id. at 6128 (footnote omitted).

> The amendment *would* apply to bar the assertion of sovereign immunity and force the court to articulate the true rationale for a decision not to grant relief.

Id. at 6131 (emphasis in the original).

Further, the legislative history makes clear that if a claimant is to be denied access to the courts it must be by virtue of limitations on judicial review *other* than sovereign immunity, such as lack of standing, that the action is not ripe for review or that the agency action is by statute unreviewable.

Therefore, as expanded upon below, the threshold principle by which this case must be viewed is that sovereign immunity poses no obstacle to full consideration by the Courts of the merits of the claims presented here.

2. Is Jurisdiction Granted By The Quiet Title Act In An Action Against The United States For Reformation Of A Deed?

Although reasonable and persuasive arguments exist that equitable actions for reformation were included within the ambit of the Quiet Title Act in 1972, any doubts which may have remained were removed entirely by the passage of the 1976 Amendment to the Administrative Procedure Act.

The net result of the 1976 Amendment was conclusively to establish the propriety of *equitable* actions against the Federal Government. Read in connection with the Quiet Title Act, the conclusion is inescapable that equitable actions relating to land, such as reformation of a deed, have been fully authorized by Congress.

Thus, "(a)n action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702 (emphasis supplied).

And the Senate Judiciary Committee, after referring to the inequities which existed in land title actions prior to the Quiet Title Act, pointedly observed:

> *Just as there is little reason why the United States as a landowner should be treated any differently from other landowners in an action to quiet title, so too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity.*

[1976] U.S. Code Cong. & Ad. News 6121, 6129 (emphasis supplied).

A surer guide to Congressional intent could not be imagined. *"(A)ll equitable actions for specific relief . . ."* within the subject matter framework authorized by Congress may be pursued by plaintiffs against the Federal Government in the Federal Courts. The subject matter framework here involved, supplied by the Quiet Title Act concerns civil actions ". . . to adjudicate a disputed title to real property in which the United States claims an interest . . ." (§ 2409a). Thus access to the Federal Courts was opened with respect to disputes involving land in which the United States claimed an interest. The emphasis is not, and should not be, on the mere question of legal title, for, as shown by Section (c) and by the legislative history, [1972] U.S. Code Cong. & Ad. News 4547 (92d Congress, 2d Sess.) the plaintiff states a cause of action by claiming a *right* with respect to real property in which the United States claims an interest. Here the *right* is to have the interests of the parties accurately stated. Further, although stated in the form of a suit for reformation, the cause of action here stated essentially involves a question of boundary. In this respect, the legislative history suggests that *"(p)erhaps the most common application of the proposed statute would be in boundary disputes between the United States and owners of adjacent property." Id* at 4551 (emphasis supplied).

Reading the 1976 Amendment together with the Quiet Title Act, therefore, the conclusion is undeniable that the action brought here was within the jurisdiction of the District Court to entertain. More emphatically, read-

ing the Quiet Title Act with the liberal interpretation mandated by Congress, as discussed below, requires this Court to construe such statute to make the courts more accessible to those having complaints against the Federal Government.

3. The Time Has Come To Modify Or Reject The Rule That Statutes Waiving Sovereign Immunity Should Be Strictly Construed In Favor Of The Sovereign

In *Califano v. Sanders, supra,* this Court construed the 1976 Amendment to the Administrative Procedure Act together with the Social Security Act and held that the former demonstrated that the Administrative Procedure Act was not intended by Congress to create new subject-matter jurisdiction and that the retention of § 205(h) of the latter, when viewed in connection with the removal of the amount-in-controversy requirement, demonstrated the "desired contours of federal-question jurisdiction over agency actions" involving the Social Security Act.

What such decision did *not* do, however, was to determine the precise effect of the 1976 Amendment upon the doctrine of sovereign immunity. We contend that the effect was to *eliminate* the doctrine for all practical purposes (within subject matter limitations) by opening the doors of the Federal Courts to all equitable actions which call agency action or inaction into question.

The net result of the 1976 Amendment is to reorder the emphasis to be placed upon statutory construction from restrictive to liberal, so as to give effect to congressional intent ". . . to ensure greater fairness and accountability in the administrative machinery of the Government", [1976] U.S. Code Cong. & Ad. News 6121, 6129-30 (emphasis supplied to quoted material).

The purpose of the amendment is clearly stated:

> The proposed legislation would amend section 702 of title 5, U.S.C., so as to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.[3]

Id. at 6121.

Clearly, the reasons for restrictive interpretations no longer exist. The basic public policy on which the doctrine was based was to protect the sovereign from judicial attack, *United States v. U. S. Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940). It was to create an "impregnable legal citadel . . . undisturbed by the demands of litigants", *United States v. Shaw,* 309 U.S. 495, 501, 60 S.Ct. 659, 84 L.Ed. 888 (1940).

But Congress has now demolished the citadel and the public policy is now to *open* the courthouse doors to litigants aggrieved at the hands of governmental agencies. Where the Court in *United States v. Shaw,* supra, noted that "(t)he reasons for this immunity are imbedded in our legal philosophy", it may now be stated, without possibility of contradiction, that that philosophy has now come full circle. The philosophy is now to *deny* immunity and to foster accountability. Such may be accomplished only by a policy of *liberal,* and not strict, interpretation.

These proper policy considerations are not new. They may be found in this Court's decisions in *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939), *F.H.A. v. Burr,* 309 U.S. 242, 60 S.Ct. 488, 84 L.Ed. 724 (1940) and *R.F.C. v. Menihan Corp.*, 312 U.S. 81, 61 S.Ct. 485, 85 L.Ed. 595 (1941).

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3. "The purpose of Congress is a dominant factor in determining meaning". *United States v. C.I.O.*, 335 U.S. 106, 112 68 S.Ct. 1349, 92 L.Ed. 1849 (1948) (footnote omitted).

The basic premise of such cases is that statutes which waive immunity are to be *liberally* construed, not *strictly* construed. Thus, in the *Keifer* case, Mr. Justice Frankfurter for the Court held that Congress, by providing for a governmental agency with sue and be sued authority was evidencing ". . . an indication of the present climate of opinion, which has brought governmental immunity from suit into disfavor, (and) partly it reveals a definite attitude on the part of Congress *which should be given hospitable scope.*" 306 U.S. 381, 391 (emphasis supplied).

The opinion of the Court then charts the proper course for the construction of the recent Congressional enactments. In Footnote 4, the following appears:

> Mr. Justice Holmes, on Circuit, gave pioneer expression to inferences to be drawn from legislative policy. "A statute", he wrote in *Johnson v. United States,* 163 F. 30, 32 (C.C.A. 1st), "may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

Id. at 391 n. 4 (other citations omitted).

After the 1976 Amendment, the courts cannot go on as before, because the policy has now indeed changed

and the Congressional pronouncement of such change is not indirect, but is direct, precise and clear: to *remove* the defense of sovereign immunity and to enhance the accountability of governmental agencies.

This Court, in *Menihan,* construed *Keifer* as holding ". . . that waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—*that being in line with the current disfavor of the doctrine of governmental immunity* . . ." 312 U.S. 81, 84 (emphasis supplied); and in *Burr,* the Court held that if authority of a governmental agency "to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." 309 U.S. 242, 245 (footnote omitted). *There is no narrow sense used here.*

The question has more recently arisen in cases involving garnishment of Federal instrumentalities. See, for instance, *Beneficial Finance Co. of New York v. Dallas,* 571 F.2d 125 (2d Cir. 1978); *Goodman's Furniture Co. v. United States Postal Service,* 561 F.2d 462 (3d Cir. 1977); *Standard Oil Division, American Oil Co. v. Starke,* 528 F.2d 201 (7th Cir. 1975); and *May Department Stores Co. v. Williamson,* 549 F.2d 1147 (8th Cir. 1977). In another context, see also *Gulf Oil Corporation v. Panama Canal Company,* 407 F.2d 24 (5th Cir. 1969). The uniform holding is that a *liberal* construction is mandated by Congressional intent.

It is clear, moreover, that the liberal interpretation mandated by the *Keifer, Burr* and *Menihan* cases is not limited to situations involving public corporations with "sue and be sued" authority. Such situations, as Mr. Justice Douglas remarked for the Court in *Burr,* are merely evidence of ". . . the current disfavor of the doctrine of governmental immunity." That disfavor has reached its culmination in the 1976 Amendment. The specific intent of Congress to equate all governmental instrumentalities insofar as the right of review is concerned is demonstrated by the following passage from the legislative history:

> Courts can make a useful contribution to the administration of Government by reviewing the legality of official conduct which adversely affects private persons. The acceptance of judicial review is reflected not only in court decisions but in the many statutes in which Congress has provided a special procedure for reviewing particular administrative activity. For years almost every regulatory statute enacted by Congress has contained provisions authorizing Federal courts to review the legality of administrative action that has adversely affected private citizens.
>
> Unfortunately, these special statutes do not cover many of the functions performed by the older executive departments, such as the Departments of State, Defense, Treasury, Justice, Interior, and Agriculture. In addition, there are omissions and gaps in the application of special review statutes. In these instances, judicial review is available, if at all, through actions involving matters which arise "under the Constitution, Laws, or treaties of the United States" as provided in section 1331(a) of title 28. These actions are referred to as "non-statutory review" actions and jurisdiction for these review procedures is in United States district courts.

[1976] U.S. Code Cong. & Ad. News 6121, 6125.

Congress in the 1976 Amendment specifically mandated broad coverage, intending to fill all gaps in providing judicial review, in furtherance of the policies of accountability and accessability. It is upon this policy determination, guided by the pioneer expressions of Mr. Justice Holmes (quoted above) on the question of inferences to be drawn from legislative policy, that this Court must finally entomb the shrine of strict interpretation. The time has come to announce to the representatives of the Federal Government that all emphasis is upon greater fairness and accountability—*promoting* judicial review rather than limiting it.

That the Federal Government will continue to pursue this limiting effort until instructed otherwise by this Court, is exemplified in *Goodman's Furniture, supra,* where the Third Circuit Court noted that the Justice Department no less than nineteen separate times had attempted to litigate the immunity of the Postal Service to state garnishment proceedings. It is precisely this type of entrenched strict interpretation which Congress had in mind to change by the 1976 Amendment:

> The importance of ameliorating the effect of the sovereign immunity doctrine . . . is emphasized by the number and variety of cases in which the defense is still raised. The committee has been advised that the doctrine has been invoked in hundreds of cases each year concerning agricultural regulations, governmental employment, tax investigations, postal-rate matters, administration of labor legislation, control of subversive activities, food and drug regu-

lation, and administration of Federal grant-in-aid programs.

> In each instance, the sovereign immunity doctrine diverts the court's attention from the basic issue concerning the availability or scope of judicial review. Sovereign immunity beclouds the real issue whether a particular governmental activity should be subject to judicial review, and, if so, what form of relief is appropriate. Its elimination as proposed in S. 800, in the words of Richard K. Berg, executive secretary, Administrative Conference, "would be a major step in rationalizing the law of judicial review of agency action. It might not change many outcomes, but it would force the courts to ask and to answer the right questions.

[1976] U.S. Code Cong. & Ad. News 6121, 6129.

The conclusion is therefore clear: that public policy now unquestionably favors agency accountability and court accessability, and that statutes *must* be construed liberally to accomplish such results. This policy involves very broad considerations, covering numerous other rules of interpretation and will necessitate other significant changes in the manner by which statutes relating to review of agency actions are interpreted. For instance, and pertinent here, as discussed below, the rule that statutes of limitations regarding agency review must be strictly construed must bow to the overriding policy that access to the courts for review of agency action is to be fostered and not limited. See, in this regard, this Court's restrictive holding in *McMahon v. United States,* 342 U.S. 25, 72 S.Ct. 17, 96 L.Ed. 26 (1951).

We submit, therefore, that the public policy announced by Congress in the 1976 Amendment requires this Court to announce sweeping changes in the rules of statutory

interpretation. The old traditions are gone and it is now time to confirm that the courts of this nation were established to serve the people and not the convenience of the sovereign.

4. Is This Action Barred As A Matter Of Law By The Twelve Year Statute Of Limitations Set Forth In Section 2409a(f)?

Stated here for convenience, the provisions of § 2409a (f) are as follows:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

In the context here presented, the issue focuses upon the definition of the phrase "claim of the United States", and the question of when the plaintiff here "knew or should have known" of such claim.

The starting point, as discussed under the previous section, is that a liberal construction, favoring access to the courts, must be applied. All doubts must be resolved in favor of the plaintiff and all inferences must be placed so as to foster accessability.

We first review some of the public background:

The official guidelines for the McGee Bend Dam taking, which was the authority of the Corps of Engineers, founded on the Act of March 2, 1945, 59 Stat. 10, were established by *Joint Policy on Land Acquisition on Reservoir Projects; Department of the Interior—Department of the Army,* 19 Fed. Reg. 381 (1954) (Ap-

pendix VI, post, page 60). The Corps' surveying of elevations and contours left much to be desired and the results spawned many problems, as appears from the Fifth Circuit Court's opinion in *United States v. 62.17 Acres of Land, Etc., in Jasper County,* 538 F.2d 670 (5th Cir. 1976).

The background for the project is accurately stated in that case as follows:

> Congress authorized the Rayburn project in 1945. In 1953, the Department of the Interior and the Army Corps of Engineers adopted a joint policy governing land acquisitions for reservoirs. See 19 Fed. Reg. 381 (January 21, 1954). Pursuant to this "Eisenhower policy", the government would acquire land for dam projects in fee simple up to the five year flood line—the level the water will reach on an average of once every five years.
>
> From 1958 to 1961, the Corps of Engineers moved to implement this policy in acquiring the land necessary for the Rayburn project. In May, 1958, the Chief of Engineers approved a calculation that the five year flood line lay on the contour 171 feet above mean sea level. The 1959 and 1961 design memoranda approved by the Chief set out more precisely the land to be taken; the Government publicly disclosed its intent to acquire fees up to the 171 foot line and flowage easements up to 179 feet at a hearing in Jasper County on December 13, 1960. During this period, the government staked out by tangent surveying the lines of acquisition as drawn in the design memoranda.
>
> Defendant landowner's predecessor in title owned a tract of over 1,800 acres which reached into the project area. In 1961, agents of the Secretary of the Army negotiated a purchase in fee of so much of

> this property as was included in what was then drawn and staked as the 171 foot contour. At the same time appellant purchased a flowage easement on this tract up to the 179 foot line.
>
> In 1965 it became obvious to the Government that it had committed errors in demarking the 1971 [*sic*] foot line. One developer's independent survey of his own contour line revealed inaccuracies; moreover, impoundment of the reservoir having commenced, the water rose in 1965 to a level that made clear the need for adjusting the Corps' original line.

538 F.2d 670, 673.

The only authority of the Corps is found in the joint policy statement of January 13, 1954, which so far as relevant, provides:

> § 8.1 *Lands to be acquired in fee.*
>
> The fee title will be acquired to the following lands:
>
> * * *
>
> (c) Fee title in general will be acquired to all land 300 feet horizontally from the edge of the conservation pool described in paragraph (b) of this section. In those projects where the topography is precipitous, or where the topography is unusually flat, and where such discretionary action is desirable, fee title may be acquired to those lands which are included in the five-year flood frequency rather than 300 feet horizontally.
>
> * * *
>
> § 8.2 *Lands for which easements are to be acquired.* Easements will be acquired to the following lands:

(a) Additional reservoir lands needed for flowage in reservoir areas above those described in § 8.1(c).

* * *

(f) Fee title may be taken as necessary where it is to the financial advantage of the Government to acquire fee rather than easement, and in special cases to prevent hardship.

§ 8.3 *Blocking out.* In land acquired in fee, blocking out will be accomplished in accordance with sound real estate practices, for example, on minor sectional subdivision lines; and, normally, land will not be acquired to avoid severance damage if the owner will waive such damage. For lands acquired in easement, close tangents may be used in the upper limit of the easement-held lands; the final easement taking line thereof should generally follow the upper flood line when elevation differences are not significant. Tangents will not be refined to the point they are economically disadvantageous. If more economical easements may be secured on the basis of the right to flood to a prescribed elevation rather than to block out the upper flood line.

* * *

§ 8.6 *Acquisition of lands for collateral purposes.* Except as authorized by law, no title to land will be acquired for purposes of preservation of wildlife or forests, restoration or replacement of such values destroyed by reservoirs or for creating additional values of like nature, or for recreational purposes.

19 Fed. Reg. 381 (1954).

The United States' acquisition policy was to acquire the fee title to the 171-foot contour and flowage easement to the 179-foot level. Kirby was so advised in the negotiations, except that the Corps as to the area in question

represented that steep bluffs and related wave action made necessary fee acquisition to the 179-foot level. Kirby wrote on November 14, 1976, in part as follows:

> 2. *171′ Contour vs. 179′ Contour*—we note that on this specific tract you intend to acquire to the 179′ contour in fee whereas it has been your policy to acquire the fee to the 171′ contour and obtain flowage easement rights between the 171′ and the 179′ contour. We, of course, are most concerned with retaining under sustained yield forest management as much land as possible. The difference in acreage may be slight, although it is not known to us. Therefore, we would appreciate your advice as to why you have elected to acquire this tract to the 179′ contour and the amount of acreage involved between the 171′ contour and the 179′ contour. Also, your reason as to why you could not acquire this tract in fee to the 171′ contour and obtain a flowage easement to the 179′ contour.

On November 18, 1969 the Corps replied as follows:

> 2. In most instances, the fee acquisition line is blocked out along the 171′ contour. However, in areas where the terrain is extremely steep and the contour pattern is such that there would be a possibility of wave action, the fee acquisition line is blocked out along the 179′ contour instead of the 171′. This policy has been followed throughout the Reservoir Area and before acquisition is instituted, the reservation lines are given close consideration and approval by higher authorities. We have made a rough calculation of the area between the 171′ and 179′ contours and find this to be approximately 38 acres.

These representations and their oral counterparts were the basis upon which the Corps induced Kirby to accept the deed of March 28, 1961.

From the Corps' standpoint, the policy was as represented by the Corps. The witnesses confirmed. The Corps' problem was that it was doing office and not ground surveying and was consequently making representations of fact which it could not possibly know were true. This is attested both by testimony and by the serious errors made throughout. Field notes of "elevations" were written by Mayberry as to segments not here involved under directions which did not involve his being out of the office. On the area here affected, he found serious errors ranging from large variance from policy to a small error where the supposed 179-ft. "contour" touched the ordinary 164-½-foot lake level.

The "extremely steep terrain" was gently sloping and wooded. There was no evidence of any erosion anywhere except a small amount at a place or two along the water line.

The Trial Court found:

> (1) The area from the true 164-foot elevation to the 171-foot elevation, and between the 171-foot elevation and the 179-foot elevation, and the area between the true 179-foot elevation and the so-called taking line of the deed, is all a very gentle and timbered slope. There are no steep bluffs in these areas. There has not been and will not be erosive wave action above the true 171-foot contour line.
>
> (2) The area between the true 171-foot meander line and the erroneous field note lines of the deed is 83.76 acres opposite the acreage presently owned by Kirby and involved herein, and 7.78 acres as respects lands opposite the lands owned now by Hart. The acreage between the 171-foot elevation meander

> line and the true 179-foot elevation is 42.82 acres as respects the lands of Kirby, 4.22 acres as respects the lands of Hart.
>
> (3) Due to mistakes above described, there is at one place 0.44 of an acre below the true 171-foot contour line and above the land described in the deed by the field notes furnished to Kirby and appearing in the deed which is not included in the lands purportedly conveyed by the deed. The Government requires and intended to acquire the fee to the 171-foot line and a flowage easement between that line and the 179-foot contour line.

The legislative history of the Quiet Title Act (cited *supra*) does not specifically define what is meant by "claim of the United States." The only language relating to accruals of causes of action is the following:

> One of the difficulties encountered in connection with this aspect of the bill had to do with the question of determining when an action accrues for the purposes of the running of the statute of limitation. The language proposed by the Department includes a provision that the action is to be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States. In its letter, the Justice Department stated that it believed that this is a reasonable approach to the question of determining the time an action accrues. The Department stated that the plaintiff under these provisions would merely have to state that he did not learn of the claim of the United States and had no reason to know of the claim more than twelve years prior to the filing of his claims. The Department then stated that if the United States wished to assert that the statute of limitation had run, it would then have the burden of establishing this fact.

[1972] U.S. Code Cong. & Ad. News 4547, 4551.

Such language, while important in demonstrating the placement of the burden of proof (giving an additional favorable inference to the plaintiff), supplies little aid in defining the phrase in question.

It is submitted that there can be no single definition of the word "claim" applicable to all situations. It will refer to different matters depending upon the facts of each case. One factor may be stated universally, however: the word "claim" has no meaning or significance whatever without a frame or point of reference. It may refer, for instance, to title, or right, or area, depending upon the frame of reference. Thus, it is not necessarily the *nature* of the "claim" which defines it; it may be its *quantum*. So it is here. Although a "claim" to something may have existed from and after the 1961 deed, the question here is: to what did the claim extend? Unquestionably all parties thought (and had no reason to think otherwise) that the claim extended to the 179-foot level, *and no more*. But the actual fact of the matter is that no one knew where the 179-foot level was! As a result of the grossly inaccurate Corps surveying about ninety acres above such level were included in the deed. Only in 1973, after the sale to Hart, accompanied by accurate surveying, was it known (and in the exercise of ordinary prudence could have been known) that the "claim" covered lands which the parties did not intend to cover. That it was even a claim of the nature contemplated by the Quiet Title Act was not known until the Corps repudiated Kirby's efforts to rectify the mistakes shortly before trial.

Here, the exact location of the 179-foot level was the controlling incident of the claim of the United States, and not the mere existence of a deed. The existence of

the deed could not initiate the accrual of a cause of action because the actual land to which the deed applied, as defined by its most important frame of reference, the 179-foot contour level, was not known. The proper definition of the phrase "claim of the United States" in the context here presented, therefore, is determined by the question "claim to what?" The claim is then defined by its locative frame of reference, the 179-foot level.

This construction, rather than the strict construction in which the Court of Appeals engaged, resolves inferences and doubts in favor of governmental accountability, as is required by the policy considerations discussed above. If the government is to be truly amenable to suit, as is the expressed intent of Congress, then the rights of the government cannot be made greater than those of the ordinary litigant. To erect the artificial and arbitrary barrier of "strict" statutory construction is to restore the sovereign to its throne rather than to promote the fairness which Congress has mandated. This Court cannot say, therefore, "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States, supra.* Reading the Quiet Title Act together with the Administrative Procedure Act, thus, particularly considering the 1976 Amendment, compels the conclusion that no longer may "strict construction" deny to plaintiffs complete access to the courts in suits against the government, or require restrictive interpretations which inhibit the policy of fairness mandated by Congress.

The Court of Appeals erred in applying a strict construction of § 2409a(f). A liberal construction would have defined "claim of the United States" by reference

to its locative factor, as demonstrated above. It follows that this action was not barred as a matter of law. The findings of the District Court, upon which reformation was granted, being supported by substantial evidence, must control.

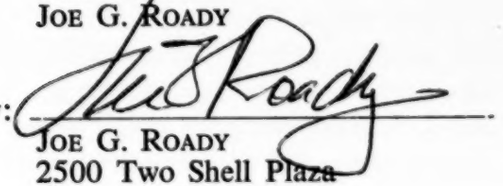
CONCLUSION

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

J. GLENN BARBER
P.O. Box 29
Jasper, Texas 75951

JOYCE COX
JOE G. ROADY

By: 
JOE G. ROADY
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Of Counsel:
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CERTIFICATE OF SERVICE

I certify that copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon counsel by placing same in the United States mail, postage prepaid, and properly addressed, this 6th day of April, 1979, to:

Solicitor General
Department of Justice,
Washington, D.C. 20530

Mr. Peter R. Taft
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

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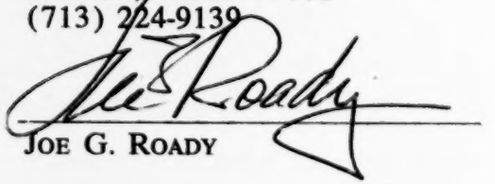
By: 
JOE G. ROADY

APPENDIX I

The Opinion of the Court of Appeals and Order on Motion For Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3849

Andrew P. Hart & Kirby Lumber Corporation,
Plaintiffs-Appellees

v.

United States of America,
Defendant-Appellant

Appeal from the United States District Court
For the Eastern District of Texas.

These appeals present similar issues arising under the Quiet Title Act, 28 U.S.C. § 2409a. We hold that both suits were time-barred by the twelve-year statute of limitations contained in the Act, Title 28, U.S.C. § 2409a(f). The facts are different in the two cases and will be stated separately.

Kirby Lumber Corporation Case

Kirby Lumber Corporation (Kirby) and Andrew P. Hart (Hart)[1] seek reformation of a 1961 deed by which

1. In 1973 Hart acquired 13 acres from Kirby. The Hart acquisition abuts the disputed land. Hart discovered and brought to Kirby's attention the mistakes that are the basis of their claim. Hart is joined as a party plaintiff because he is a successor to Kirby's interest in 13 acres.

Kirby had conveyed land to the United States. The land was bought in that year by the U.S. Army Corps of Engineers in connection with the construction of a dam and reservoir. Representatives of the Corps notified Kirby that it intended to acquire in fee simple the area for the reservoir up to the 171-foot elevation level. Kirby was later told that the Corps would purchase some land in fee up to the 179-foot level because erosion on certain steep inclines was possible. Kirby was told where the contour line would be marked and surveyors for the company computed the amount of acreage involved in the transaction. Through an error in the Corps' calculations, the United States bought land above the 179-foot elevation level. Kirby also contends that it later discovered that no steep bluffs in the area warranted purchase of the land up to the 179-foot mark.

The metes and bounds description of the land bought in 1961 by the United States from Kirby is not challenged. Nor does Kirby dispute that the United States paid the agreed price for the full amount of property contained in the deed. The contention of Kirby and Hart is that the United States acquired more land than it needed as a result of a mutual mistake.

The district court found as fact that the Corps of Engineers had mistakenly made misrepresentations of fact to Kirby with respect to (1) the steepness of the banks adjacent to the 171-foot level (2) the necessity of its acquiring land to the 179-foot level, (3) the description of the boundaries as meanders of the 179-foot level, and (4) the amount of total acreage between 171 feet and 179 feet. The court further found that Kirby did not discover the misrepresentations until 1973 and in the exercise of ordinary prudence would not have discovered

the errors until that time. On the basis of these findings it concluded that Kirby and Hart were entitled to have the deed reformed to provide that the United States owns fee simple title only to the 171-foot contour line with a flowage easement above that level to the 179-foot contour, and that Kirby and Hart should refund to the United States a proportionate amount of the original purchase price.

City of Laredo Case

This case involves title to the minerals underlying the former Laredo Air Force Base. In 1943 the United States purchased the disputed property from the City for use as a pilot training facility. After the war it reconveyed the property to Laredo for use as a municipal airport. When the Korean conflict began, the United States leased the property from Laredo for use as an Air Force base. In 1954 the mayor of the City of Laredo wrote to the Air Force requesting that the base be designated a permanent military installation. At that time the term "permanent" had significance in connection with the Air Force's requirements for construction at the base of family (or so-called Wherry) housing. The City also appears to have been concerned with securing the designation as an administrative manifestation of intent. In any event the Air Force advised the City of its requirements for a permanent installation designation. In fulfilling these requirements, the City conveyed the property back to the United States, and the deed was duly recorded in 1955. At that time the Air Force notified Laredo that the attorney general had approved title to the property and that the only unfulfilled requirement was requesting the governor to relinquish state jurisdiction in order that the federal

government might have exclusive jurisdiction. In 1957, however, the Air Force advised Laredo that there had been a change in policy and that exclusive jurisdiction would not be requested. In March of that year Laredo was advised through its congressman that the Air Force base would not be designated a permanent installation because that term had lost its significance in connection with construction of housing and was no longer being used by the Air Force. The base continued to be used as an active military installation, however, until 1974 when it was deactivated and transferred to the General Services Administration for disposal.[2] G.S.A. transferred the surface to the City. The City then filed this suit seeking to cancel or reform the 1955 deed so that it would also acquire the mineral estate.

Both sides agree that no issue of fact is disputed. The district court entered summary judgment for the United States on the basis of its holding that under the doctrine of sovereign immunity the court lacked jurisdiction over actions against the United States to cancel or reform deeds and in addition that any such action was barred by the statute of limitations.

Both Claims Are Barred

The goverment argues strenuously that reformation of the two deeds is not within the scope of the relief authorized by the Quiet Title Act. It points out that suits against the sovereign cannot be maintained without express statutory consent, *Stanley v. Schwalby*, 162 U.S. 255, 16 S.Ct. 754, 40 L.Ed. 960 (1896), and that statutory consents to suit are strictly construed. *McMahon v. United States*, 342 U.S. 25, 72 S.Ct. 17, 96 L.Ed. 26 (1951); *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). It argues that an equitable claim to have a deed reformed is fundamentally different from the type of proceeding to which Congress consented when it enacted the Quiet Title Act. We do not find it necessary to resolve this contention because the claims of both Kirby and the City of Laredo were clearly barred.

2. There is no indication from the record that the failure of the Air Force to designate the base as permanent had any effect on such action. Subsequent to the conveyance of the base by Laredo to the United States, substantial numbers of both permanent bases and non-permanent bases were closed.

The consent of Congress as embodied in the Quiet Title Act contains the following express statute of limitations:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. *Such action* shall be deemed to have *accrued on the date the plaintiff* or his predecessor in interest *knew* or should have known *of the claim of the United States.*

28 U.S.C. § 2409a(f) (emphasis added).

In both cases before us, the ownership claimed by the United States was well known to the plaintiffs more than twelve years before suit was brought. Kirby had delivered a deed to the United States describing the conveyed lands by metes and bounds. There is no dispute that it knew precisely the extent of United States' ownership. At the heart of the Kirby claim is its assertion that it did not know until 1973 that the Corps of Engineers had misrepresented its needs and mistakenly bought an excessive amount of land. Similarly, the City of Laredo had con-

veyed the real estate in question to the United States. Its contention is that the government did not effectively accept the deed because it did not designate the Air Force base as a permanent military installation. It does not dispute, however, that since the air field was reconveyed to the government, the United States has held record legal title, has physically occupied the real estate, and has operated thereon a military installation. More than twelve years before it filed suit, the City of Laredo was notified that the Air Force had decided not to declare the base a permanent installation because the designation had become meaningless.

In granting the consent to sue, Congress has full latitude to impose such conditions as it sees fit. It could, for example, have made the Quiet Title Act wholly prospective in operation, and it apparently considered doing so. The legislative history indicates that in some respects the Senate's original proposal would have treated stale claims more liberally than did the Act as it was finally adopted. The Department of Justice objected with the result that this provision was deliberately tightened up by the House of Representatives. In House Report No. 92-1559, 92d Congress, 2d Session (1972), this history is detailed as follows:

> Subsection (f) is different from the original proposal, but this is the language recommended by the Department of Justice in its letter of September 20, 1972, which was referred to above. As that letter stated, the Department is willing to accept this provision making the provisions added by the bill retroactive for twelve years. This is intended to give persons claiming right, title or interest in real property in which the United States claims an interest, that period in which to bring suit. As was noted

> by the Department, *the period is fixed in this manner so that the Government will not have to defend against sta[l]e claims.*
>
> . . .
>
> As has been noted one of the basic provisions in the committee amendment is the retroactive feature which provides for a 12 year statute of limitation. The original draft submitted to the Congress by the Justice Department explicitly provided that the proposed bill would ". . . not apply to any claim or right of action which accrued prior to the date of its enactment." At the hearing on S. 216 and related bills on February 24, 1972, much of the testimony related to some of the specific problems concerning title to lands which motivated, in part, the introduction of this legislation. The existing problems faced by many citizens concerning titles to land in which the United States claims an interest could not be the subject of actions under legislation with the original Department Language which would have had only prospective force. In the opinion of the committee, the language proposed by the Justice Department providing for a twelve year period for the bringing of such actions will make a reasonable provision for the bulk of the existing controversies concerning title.

1972 U.S. Code Cong. & Admin. News, pp. 4550-51 (emphasis added).

The referenced recommendation of the Department of Justice was contained in a letter from the Deputy Attorney General to the House Subcommittee Chairman dated September 20, 1972. It expressed the Department's opposition to the provision in the Senate version of the bill that would have given claimants two years after the effective date of the Act to begin an action, and would

thereby have made the Act fully retroactive. In support of the adopted language the Deputy Attorney General wrote,

> As you know, the Department of Justice has been reluctant to open up stale claims to litigation. If the bill were made fully retroactive, there could be a flood of litigation on old claims, many of which had already been submitted to the Congress and rejected. However, we believe that a reasonable period of retroactive application of the bill would not put an undue burden on the Department and the courts, and we would be willing to accept a provision making the bill retroactive for twelve years.
>
> Similarly, we suggest that the statute of limitations be extended from six to twelve years for quiet title actions. This will give claimants to land in which the United States also claims an interest ample time to bring suit without necessitating the United States' having to defend against stale claims.

Id. at 4553.

Whether the equitable considerations advanced by plaintiffs would be persuasive under other facts is wholly beside the point. We have before us an Act of Congress that is understandable in both language and intent. The Supreme Court spoke specifically of a period of limitations applicable to a waiver of sovereign immunity in *McMahon, supra,* when it held, "[S]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." 342 U.S. at 27, 72 S.Ct. at 19. Such a construction of the Quiet Title Act compels our conclusion that the Kirby and Laredo claims were both barred by the limitations provision of the Act. *See Grosz v. Andrus,* 556 F.2d 972 (9th Cir. 1977).

The district court's judgment in the case of Hart and Kirby against the United States will be reversed and remanded with instructions that the plaintiffs' complaint be dismissed. In the case of the City of Laredo against the United States, summary judgment in favor of the United States will be affirmed.

REVERSED as to Case No. 76-3849.

AFFIRMED as to Case No. 78-1227.

VANCE, Circuit Judge.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3849

ANDREW P. HART and
KIRBY LUMBER CORPORATION,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING

(January 11, 1979)

Before GEE and VANCE, Circuit Judges, and HUNTER,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT J. VANCE
United States Circuit Judge

---

* United States Senior District Judge for the Western District of Louisiana, sitting by designation.

APPENDIX II

The Findings of Fact and Conclusions of Law of the District Court

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-75-92-CA

ANDREW P. HART and
KIRBY LUMBER CORPORATION,
Plaintiffs

v.

UNITED STATES OF AMERICA,
Defendant

Honorable J. Glenn Barber
P. O. Box 291
Jasper, Texas 75951
Attorney for Plaintiff, Andrew P. Hart

Honorable Joyce Cox
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Attorney for Plaintiff, Kirby Lumber Corp.

Honorable Dan McNulty
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P. O. Box 1510
Beaumont, Texas 77704
Attorney for Defendant,
United States of America

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-styled and numbered cause came on for trial at a regular term of Court, and the cause having been submitted to the Court, and the Court having considered the pleadings, the evidence adduced at the trial, the comments of counsel, and the briefs filed by the respective parties, and having been fully advised on the premises, now makes and files its findings of fact and conclusions of law.

STATEMENT OF THE NATURE OF THE CAUSE OF ACTION

In this action, Kirby Lumber Corporation, and Andrew P. Hart, Assignee of a portion of the rights of Kirby Lumber Corporation herein asserted, seek to reform deed executed by Kirby Lumber Corporation dated March 28, 1961, conveying to the United States of America certain lands underlying and adjacent to the site of Lake Rayburn in Jasper County, Texas. In the years 1960 and 1961, the United States Army Corps of Engineers (The Corps) was in the process of acquiring from a number of landowners title to lands, and flowage easements over adjacent lands for the purpose of constructing the lake reservoir. The titles to the lands and easements over land were taken in the name of the United States pursuant to authority and duty vested by an Act of Congress.

FINDINGS OF FACT

1.

Kirby Lumber Corporation (Kirby) was during the year 1960 and in the early part of the year 1961 the

owner of large areas of timberland in Texas and elsewhere, including sizeable tracts included in and adjoining the proposed lake site, including one tract in the Lewis Letney League in Jasper County (Abstract No. A-344) and San Angustine County (Abstract 660), and another tract adjacent thereto in the Beatty Seale and Forward Survey Abstract 569 in Jasper County.

2.

The Corps, pursuant to its duty: (1) ascertained that the normal level of the water to be impounded in the lake would reach and cover lands to the 164-foot level of ground elevation above sea level, would at five-year flood level reach and cover to the 171-foot contour level above sea level and on occasion of possible very high water, overflow to a level of 179 feet above sea level; (2) informed affected landowners of its policy decision to acquire from landowners by condemnation, the fee simple title to the surface of lands under and adjacent to the lake site lying below the 171-foot elevation, and a flowage easement over and across lands adjacent to the lake site lying above the 171-foot elevation level and below the 179-foot elevation level, and (3) notified Kirby Lumber Corporation with respect to the various tracts owned by it that such was the policy.

3.

With respect to the tracts herein involved, the Corps mistakenly represented to Kirby Lumber Corporation the following facts, which Kirby accepted, and was justified in accepting as true:

(1) The lands in the Beatty Seale and Forward Survey and in the Letney League, excepting those

in three relatively small areas near the south boundary of the Letney League, had steep banks adjacent to and above the 171-foot level of elevation.

(2) That as respects the lands involved in this cause, the last mentioned factor would cause erosion from wave action; and necessarily The Corps would need to acquire the fee simple title with respect to such lands to the 179-foot contour level.

(3) That the field notes furnished by The Corps to outline the boundaries of lands to be acquired were meanders of the 179-foot contour level, showing by tangent lines the outline of such ground level.

(4) That the total acreage between the 171-foot contour line and the 179-foot contour line was only 38 acres.

4.

Kirby Lumber Corporation accepted the foregoing representations by The Corps, and checked the meanders, or tangent calls, outlined by The Corps, and furnished to it only to ascertain if the lines met mathematically, as checked by it, between its known tract boundaries and corners, proceeding from each such established tract boundary and corner to the next such tract boundary line or corner called for, and terminated properly on each tract corner or line as called for in the meander notes.

5.

Accepted surveying practice in ascertaining and denoting the meanders of an elevation contour is to locate each point called for at the elevation sought to be indicated, and calling for a course and distance between two such adjacent points. Ground surface is usually

uneven in elevation. To denote by field notes exact elevation contours is practically impossible except as to perfectly level ground such as is rarely encountered. Accordingly, elevation points are established on the ground at points between which there is approximately even elevation. In uneven terrain, meander points are accordingly and of necessity shorter than in terrain where the elevations do not radically and abruptly change. In surveying art, the meanders of a contour line, like the meanders called for on the borders of streams, are used as practical substitutes for the impractical tracing of the exact variants of elevation to which the water will rise, and also used for calculating acreage. The background of this acquisition for purposes of the lake, and the irregular nature of the calls (called in the deed lines of "severance") of the deed herein referred to, make necessary the interpretative conclusion that in each instance the irregular calls between two established tract boundary points are meander calls.

The field notes furnished by the Government, corrected only to close to established tract lines and corners, were adopted and included in deed executed by Kirby Lumber Corporation to United States of America, dated March 28, 1961, hereinabove referred to. The deed conveys tracts denominated in the deed as Tracts 301-1 and 301-2. The southern portion of the lands described as Tract 301-1, describing boundaries of three small segregated areas not taken, are in the class of areas in which Kirby Lumber Corporation conveyed fee simple title to a purported 171-foot contour line and with respect to which flowage easements were conveyed by separate deed to the area lying between the alleged meander calls for the 171-foot level to the actual 179-

foot level on the ground. Kirby has conveyed these three segments of the land described in said deed, by exchange of lands, to persons not involved in this litigation; and these areas have been removed from contention in this cause.

6.

On February 28, 1973, Kirby conveyed to Plaintiff Hart a 12.95-acre tract in the B & S F Survey, including all rights Kirby might have with respect to lands lying between the boundary of said tract and the lake. Hart noted the gradually sloping nature of the terrain between his tract and the lake, and employed a Licensed Land Surveyor, who found large discrepancies between the description in the deed from Kirby and the actual 179-foot contour. Hart made inquiry of Kirby and learned of the representations above adverted to made by The Corps of Engineers. Kirby Lumber Corporation subsequently examined the terrain of the lands it had conveyed to the United States, and employed a surveyor, the surveyor employed by Hart, to investigate with respect to its then ownership in the two surveys in question, and report.

7.

I find that Kirby Lumber Corporation reasonably and justifiably relied upon the representations made by The Corps of Engineers acting for the United States and did not discover, and the exercise of ordinary prudence would not have discovered, the errors made in such representations until a time subsequent to February 28, 1973.

8.

In truth The Corps made no ground survey of the meander calls furnished by it, but erroneously thought, from examination of a relatively small scale USC&GS map, that The Corps was furnishing field notes contouring the 179-foot contour. It also erroneously thought the area in question above the 171-foot contour was an area of steep banks subject to erosion by wave action. The erroneous field notes placed the 179-foot contour line as high as 215.9 feet actual elevation in one place, all such field notes being substantially and unreasonably above the true 179-foot actual elevation of the ground above sea level, except for one instance where the field notes placed the 179-foot level below the true 171-foot level.

9.

As a matter of fact:

(1) The area from the true 164-foot elevation to the 171-foot elevation, and between the 171-foot elevation and the 179-foot elevation, and the area between the true 179-foot elevation and the so-called taking line of the deed, is all a very gentle and timbered slope. There are no steep bluffs in these areas. There has not been and will not be erosive wave action above the true 171-foot contour line.

(2) The area between the true 171-foot meander line and the erroneous field note lines of the deed is 83.76 acres opposite the acreage presently owned by Kirby and involved herein, and 7.78 acres as respects lands opposite the lands owned now by Hart.

The acreage between the 171-foot elevation meander line and the true 179-foot elevation is 42.82 acres as respects the lands of Kirby, 4.22 acres as respects the lands of Hart.

(3) Due to mistakes above described, there is at one place 0.44 of an acre below the true 171-foot contour line and above the land described in the deed by the field notes furnished to Kirby and appearing in the deed which is not included in the lands purportedly conveyed by the deed. The Government requires and intended to acquire the fee to the 171-foot line and a flowage easement between that line and the 179-foot contour line.

Had it not been for the misrepresentations and mistakes above found to have been made to the March 28, 1961, deed, pursuant to their agreed scheme of conveyance, the parties would have executed and accepted respectively a fee deed to the meanders of the 171-foot contour line as it actually exists and a flowage easement there above to the true 179-foot contour line.

10.

The United States paid to Kirby overall a price of $164.83 per acre for all lands taken from it in fee from its tracts in the two surveys herein involved, and $19.65 per acre for flowage easements from said tracts. Equity requires that on reformation of said deed the United States should be repaid by Defendants (*sic*) a sum computed as follows:

91.98 acres between the 171-foot contour line and the deed "taking line" at $164.83 per acre	$15,161.06
LESS credits for 0.44 acres not paid for below the 171-foot contour at $164.83 per acre	72.53
LESS credit for 47.04 acres at $19.65 per acre for the acre below the flowage easement between the true 171- and 179-foot lines	924.34
NET AMOUNT due the United States	$14,164.19

$12,964.73—payable by Kirby;

$ 1,199.46—payable by Hart.

11.

When the above formula is applied and the payments made, the amount paid by the Government will be the sum of $164.83 per acre for all acreage taken in fee by the reformed deed and the sum of $19.65 per acre for the lands taken by flowage easement under the deed as reformed.

12.

The true 171-foot contour line which should be the boundary of the lands taken in fee by the deed is described in field notes hereto attached. The true meanders of the 179-foot contour are reflected in field notes on file with the papers of this cause.

CONCLUSIONS OF LAW

1.

The Court has jurisdiction of the parties and of this cause.

2.

The deed dated March 28, 1961, from Kirby Lumber Corporation to the United States of America should be and is hereby reformed to provide that the United States of America acquire the fee simple title to land up to and including the true 171-foot contour line as described in the field notes hereto attached, and a flowage easement over and across lands above the 171-foot contour and below the 179-foot contour, and that no improvements shall be placed upon the flowage easement except as permitted by the United States under regulations duly promulgated by The Corps or other authorized agency, and by permission thereunder extended by competent authority.

3.

The original deed of March 28, 1961, according to its own terms on the background on which it was executed, and as intended, should be reformed to provide that the line of original taking was to delineate the true 179-foot contour line, and that the so-called line of taking in said deed was merely a meander of such 179-foot elevation.

4.

The United States of America should be granted judgment against Plaintiff, Kirby Lumber Corporation, in

the sum of $12,964.73 and against Andrew P. Hart in the sum of $1,199.46.

5.

No defenses raised by the Government constitute a bar to the above order of the Court.

6.

Judgment for Plaintiffs should be entered according to the above conclusions.

DATED this _____ day of June, 1976.

/s/ JOE FISHER
United States District Judge

[Field Notes Omitted]

APPENDIX III

5 U.S.C. §§ 701-706, Prior to 1976 Amendment

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate

remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.

APPENDIX IV

The 1976 Amendment to the Administrative Procedure Act, 5 U.S.C., §§ 702, 703, and of 28 U.S.C., §§ 1331(a) and 1391(e) 90 Stat. 2721 (1976)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of preceding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject

matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

SEC. 2. Section 1331(a) of title 28, United States Code, is amended by striking the final period and inserting a comma and adding thereafter the following: "except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

SEC. 3. The first paragraph of section 1391(e) of title 28, United States Code, is amended to read as follows:

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties

to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

Approved October 21, 1976.

APPENDIX V

The Quiet Title Act

28 U.S.C., §§ 1346(f), 1402(d), 2409a

* * *

§ 1346. United States as defendant.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

§ 1402. United States as defendant.

* * *

(d) Any civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States shall be brought in the district court of the district where the property is located or, if located in different districts, in any of such districts.

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plantiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(d) If the United States disclaims all interest in the real property or interest therein adverse to the plantiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(e) A civil action against the United States under this section shall be tried by the court without a jury.

(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor

in interest knew or should have known of the claim of the United States.

(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

Added Pub.L. 92-562, § 3(a), Oct. 25, 1972, 86 Stat. 1176.

APPENDIX VI

The Official Guidelines for Agency Action

TITLE 43—PUBLIC LANDS: INTERIOR

Subtitle A—Office of the Secretary of the Interior

[Order No. 2744]

Part 8—Joint Policy for Land Acquisition on Reservoir Projects; Department of the Interior—Department of the Army

January 13, 1954.

Sec.

8.1 Lands to be acquired in fee.
8.2 Lands for which easements are to be acquired.
8.3 Blocking out.
8.4 Mineral rights.
8.5 Buildings.
8.6 Acquisition of lands for collateral purposes.
8.7 Application of policy.

Authority: §§ 8.1 to 8.7 issued under sec. 7, 32 Stat. 389, sec. 14, 53 Stat. 1197; 43 U.S.C. 421, 389.

§ 8.1 *Lands to be acquired in fee.* The fee title will be acquired to the following lands:

(a) Lands necessary for permanent structures.

(b) Lands below the top of the pool elevation for storing water for navigation, power, irrigation and other conservation purposes.

(c) Fee title in general will be acquired to all land 300 feet horizontally from the edge of the conservation

pool described in paragraph (b) of this section. In those projects where the topography is precipitous, or where the topography is unusually flat, and where such discretionary action is desirable, fee title may be acquired to those lands which are included in the five-year flood frequency rather than 300 feet horizontally.

(d) Additional lands which may be needed to provide for limited public use and reasonable access in accordance with applicable laws, or for operation and maintenance of the project.

(e) Lands covered by the exception noted in § 8.2(f).

§ 8.2 *Lands for which easements are to be acquired.* Easements will be acquired to the following lands:

(a) Additional reservoir lands needed for flowage in reservoir areas above those described in § 8.1(c).

(b) Lands in reservoir areas of navigation only projects.

(c) Lands in reservoir areas of flood control only projects which do not provide conservation pools.

(d) Lands required for a relatively short time for temporary structures or for use during the construction period only.

(e) Easements may be required for lands in the zone as defined in § 8.1(c) above the conservation pool, and which are in remote areas of the reservoir or which had previously been subject to frequent inundation, where it is determined that fee title is not required.

(f) Fee title may be taken as necessary where it is to the financial advantage of the Government to acquire

fee rather than easement, and in special cases to prevent hardship.

§ 8.3 *Blocking out.* In land acquired in fee, blocking out will be accomplished in accordance with sound real estate practices, for example, on minor sectional subdivision lines; and, normally, land will not be acquired to avoid severance damage if the owner will waive such damage. For lands acquired in easement, close tangent may be used in the upper limit of the easement-held lands; the final easement taking line thereof should generally follow the upper flood line when elevation differences are not significant. Tangents will not be refined to the point they are economically disadvantageous. If more economical, easements may be secured on the basis of the right to flood to a prescribed elevation rather than to block out the upper flood line.

§ 8.4 *Mineral rights.* Mineral, oil and gas rights will not be acquired where the owner objects or where a substantial additional cost would be involved, except where mineral development would interfere with operation of the project or except where required by the provisions of the Atomic Energy Act. Mineral rights not acquired will be subordinated to the Government's right to regulate their development in a manner that will not interfere with the primary purposes.

§ 8.5 *Buidings.* Buildings for human occupancy as well as other structures which would interfere with the operation of the project for its primary purposes would be prohibited in the reservoir areas on lands for which an easement is acquired.

§ 8.6 *Acquisition of lands for collateral purposes.* Except as authorized by law, no title to land will be acquired for purposes of preservation of wildlife or forests, restoration or replacement of such values destroyed by reservoirs or for creating additional values of like nature, or for recreational purposes.

§ 8.7 *Application of policy.* The policy set forth in this part will govern the determination as to acquisition of any tract on which title to the United States has not been vested or a final judgment in condemnation has not been entered except for projects on which the land acquisition program has progressed to the point where application of the policy would be unreasonable or to the distinct disadvantage of the United States or to the general public. The application of the principles and criteria outlined above to lands already acquired for reservoir projects by disposal of fee title to former owners will require Federal legislation. Flowage easements will be retained where necessary. All other lands rendered surplus by this policy will continue to be disposed of in accordance with existing laws.

Ralph A. Tudor
Acting Secretary of the Interior.

[F. R. Doc. 54-358; Filed Jan. 20, 1954; 8:45 a.m.]

Supreme Court, U. S.
FILED
JUN 2 1979
MICHAEL RODAK, JR., CLERK

No. 78-1536

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANDREW P. HART AND KIRBY LUMBER CORPORATION,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29-37) is reported at 585 F.2d 1280. The findings of fact and conclusions of law of the district court (Pet. App. 39-49) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1978. A petition for rehearing was denied on January 11, 1979 (Pet. App. 38). The

petition for a writ of certiorari was filed on April 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 2409a(f) provides:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

QUESTION PRESENTED

Whether the 12-year limitations period on actions filed against the United States under the Quiet Title Act, 28 U.S.C. 2409a(f), bars an action commenced 14 years after the plaintiff conveyed the land to the United States.

STATEMENT

1. On March 28, 1961, the Kirby Lumber Corporation executed a general warranty deed conveying over 2,000 acres to the United States. The government acquired the land for use in connection with the Sam Rayburn Reservoir and Dam, an Army Corps of Engineers project on the Angelina River in Texas.[1]

[1] The project was originally known as the McGee Bend Reservoir and Dam project. It was authorized by the Act of March 2, 1945, ch. 19, 59 Stat. 10. The name was changed by the Act of September 11, 1963, Pub. L. No. 88-123, 77 Stat. 155.

The deed to the land was obtained by the United States through negotiated purchase rather than condemnation.

In 1958, the Corps of Engineers had announced that land for this project would be acquired in fee from the reservoir floor to approximately the 171-foot mean sea level contour and that flowage easements would be obtained for higher land to approximately the 179-foot contour.[2] As an exception to this policy, however, the Corps proposed to acquire fee title for land to approximately the 179-foot contour in areas where erosion above the 171-foot contour was predicted.

The Corps of Engineers determined that the land covered by the Kirby deed was in such an erosion-prone area. Accordingly, in November 1960, they explained to Kirby that they desired to acquire the land between the 171-foot and 179-foot contours. A tract description document was furnished to Kirby which detailed both the acreage to be acquired and the metes and bounds of the proposed boundary line. In June 1960, Kirby checked the proposed boundary

[2] This was based on the Joint Policy for Land Acquisition on Reservoir Projects: Department of the Interior—Department of the Army, 19 Fed. Reg. 381 (1954) (Eisenhower Policy) (Pet. App. 60-63). Under this policy, fee title is acquired for land expected to be inundated by flood waters on an average of once every five years. For the Rayburn project, the five year flood elevation was determined to be 171-feet. The 179-foot contour was determined to be the elevation subjected to inundation once every fifty years.

markers and, after some negotiation, accepted the government appraisal as the purchase price.

The warranty deed conveying the land to the United States repeated the metes and bounds from the tract description. Neither the deed nor the sale contract made any reference to a contour line or elevation. There is no contention that the acreage conveyed differed from the tract description or that the boundary line created by the instruments is ambiguous.

2. On February 28, 1973, Kirby conveyed approximately 13 acres adjacent to the project to petitioner Hart. The deed contained the metes and bounds description of the boundary line from the prior conveyance to the United States. Thereafter, Hart had the property surveyed and found that the deed line in the conveyance to the United States diverged from the 179-foot contour so that it enclosed land of higher elevations. He sought an adjustment of this boundary line, which was refused by the Corps on the ground that the area was potentially subject to erosion.

This suit was then filed on March 28, 1975. The complaint asked the court to reform the deed to the United States by replacing the metes and bounds of the conveyance with a description conveying lands only to the 171-foot contour. In effect, petitioners sought to divest the government of approximately 93 acres above the 171-foot contour line.

Following a bench trial, the district court rejected the government's motions to dismiss the action for failure to state a claim, failure of subject matter

jurisdiction and failure to comply with the 12-year statute of limitations for actions brought against the United States to quiet title under 28 U.S.C. 2409a(f). The court accepted petitioner's claims and reformed the deed to convey to the United States the land to the 171-foot contour in fee, and a flow easement for the land to the 179-foot contour (Pet. App. 39-49).

The court of appeals reversed, holding that the 12-year statute of limitations in 28 U.S.C. 2409a(f) had expired before this suit was filed. The court remanded the case to the district court with directions to dismiss (Pet. App. 29-37).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Further review of the decision in this case is therefore not warranted.

The Quiet Title Act grants consent to suit to actions involving disputed title to real property in which the United States claims an interest. 28 U.S.C. 2409(a). The Act, however, limits the consent to actions filed within 12 years of the date on which the plaintiffs knew or should have known of the claim of the United States.[3] 28 U.S.C. 2409a(f). It is the

[3] The statute provides that "[a]ny civil action under this section *shall be barred* unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. 2409a(f) (emphasis supplied). Prior to enactment, the limitations section of the Quiet Title Act was the subject of extensive congressional attention. The length of the limitations period, provision for retrospective application, and the definition of the accrual of a cause of action were considered and redrafted

settled rule that "[s]uits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Reid* v. *United States*, 211 U.S. 529, 538 (1909) (Holmes, J.). Moreover, conditions or limitations to a consent to suit are to be interpreted strictly in favor of the sovereign.[4] *McMahon* v. *United States*, 342 U.S. 25, 27 (1951); see *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*,

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several times before the legislation was finalized. See S. Rep. No. 92-575, 92d Cong., 1st Sess. 2-3, 8 (1971); H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 5 (1972). See *Hatter* v. *United States*, 402 F. Supp. 1192, 1194 (E.D. Cal. 1975). The 12-year limitations period was designed to provide a fair opportunity to litigate title claims against the United States.

[4] Petitioners contend (Pet. 10-17) that the enactment of the 1976 amendments to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, reversed the rule that waivers of sovereign immunity are to be strictly construed. These amendments, however, were concerned with actions subject to the judicial review provisions of the APA. S. Rep. No. 94-996, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 3 (1976). Congress intended the waiver of sovereign immunity in the 1976 amendments to have no effect on the requirements and limitations on previously enacted consents to suit. S. Rep. No. 94-996, *supra*, at 12, 26; H.R. Rep. No. 94-1656, *supra*, at 12-13. Thus, the amendment to Section 10(a) of the APA provides, "[n]othing herein * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." Act of October 21, 1976, Pub. L. No. 94-574, Section 1, 90 Stat. 2721, 5 U.S.C. 702. Since the relief sought by petitioners is forbidden by the Quiet Title Act, 28 U.S.C. 2409a(f), the 1976 amendments on which petitioners rely are not relevant.

312 U.S. 584, 586 (1941). Because petitioner Kirby did not file this action until 14 years after it conveyed the land to the United States, the court of appeals correctly concluded that the claim is time-barred by the statute.

Petitioners contend (Pet. 24-25), however, that the claim of the United States is not based on the metes and bounds established in the 1961 deed, but is based instead on the 179-foot contour line around the dam project. Petitioners claim that they could not reasonably have known that the 1961 deed conveyed land above the 179-foot contour line before the land was surveyed in 1973 and that, since this lawsuit was filed only two years after that survey, it is not barred by the 12-year statute of limitations in 28 U.S.C. 2409a(f). But it is obvious that the claim of the United States to this land is based on the metes and bounds description of the 1961 deed, which does not incorporate or in any way refer to the 179-foot contour line. The very purpose of employing a metes and bounds description, rather than a contour line, in such a conveyance is presumably to avoid subsequent confusion and disputes as to the precise location of the land claimed by the United States. Petitioners cannot now urge that the unambiguous claim established by the United States in the 1961 deed on the basis of precise metes and bounds is, in fact, only a shorthand reference to an ambiguous contour line that was not incorporated into the deed. Cf. *Grosz* v. *Andrus*, 556 F.2d 972, 974-975 (9th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
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JUNE 1979

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF KIRBY FOREST INDUSTRIES, INC. AND ANDREW P. HART IN RESPONSE TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1536

ANDREW P. HART AND KIRBY LUMBER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF KIRBY FOREST INDUSTRIES, INC. AND ANDREW P. HART IN RESPONSE TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

The Government, in its Brief in Opposition, engages in two material and basic misconceptions. Stated here generally, with brief amplification and discussion to follow, the misconceptions are as follows:

1. The Government contends[1] that the statute of limitations set forth in the Quiet Title Act [28 U.S.C. § 2409 a(f)] "expressly or impliedly forbids the relief which is sought" in this action within the meaning of the 1976 Amendment to Section 10(a) of the Administrative Pro-

1. Brief in Opposition, footnote 4, page 6.

cedure Act (5 U.S.C. § 702), which contention is a basic misconception of the meaning and intent of the 1976 Amendment and of the nature and effect of a statute of limitations.

2. The Government also contends[2] that the 1961 deed may be viewed apart from the limitations upon the authority of the Corps of Engineers, which is a misconception of basic Constitutional and statutory limitations upon governmental action in the taking and holding of property for public use.

MISCONCEPTION NO. 1

The Government, by saying that a statute of limitations "forbids relief" within the meaning of the 1976 Amendment, first, confuses a bar of relief with the expression of an exclusive remedy, and, second, overlooks the specific expression of intent set forth in the legislative history of the 1976 Amendment which clearly delineates the type of statutory limitation which Congress had in mind in connection with the "forbidding relief" concept.[3]

2. Id, page 7.

3. See [1976a] U.S. Cong. & Adm. News, 6133 (92nd Cong. 2d Sess.) which reads as follows:

"Likewise, the amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. Clause (2) of the third new sentence added to section 702 contains a second proviso concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act, Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, i.e., the Tucker Act, 'impliedly forbids' relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims.

The language of clause (2) of the proviso directs attention to particular statutes and the decisions interpreting them. If a statute 'grants consent to suit' with respect to a particular subject matter, specific relief may be obtained only if Congress has not intended that provision for relief to be exclusive.

Clause (2) of the proviso does not withdraw specific relief in any situation in which it is now available. It merely provides that new authority to grant specific relief is not conferred when Congress has dealt in particularity with a claim and intended a specified remedy to be the exclusive remedy." (Footnotes omitted).

A statute of limitations is not an expression of an exclusive remedy. It is, rather, the expression of a time-bar to the remedy which the claimant seeks. Congress clearly intended to refer to the expression of an exclusive remedy in prior consent legislation—and not to statutes of limitations—to determine whether such prior legislation "forbids relief", there referring specifically to the Court of Claims Act, where a damage remedy was created for contract claims. The House Report there sets out the remedy intended to be forbidden by such exclusive remedy: specific performance of government contracts.

A statute of limitations cannot be an expression of an exclusive remedy not only because it is not a limitation on the *nature* of the remedy, but because it depends upon conduct outside of the statute for its effectiveness, i.e. a non-enforcement of the remedy for the statutory period. Is the remedy sought by a claimant affected by the statute of limitations if suit is brought *within* the statutory period? Obviously not. Just as obviously, therefore, the statute of limitations cannot be utilized to define the exclusivity of a particular remedy.

The question posed by the Government in reality is whether the Quiet Title Act expressly or impliedly forbids

the relief sought here. If it does not, then there is no reason why the 1976 Amendment should not be applicable to this action, to aid in the construction of the intent of Congress regarding "strict" interpretation of consent statutes, Petitioners' arguments on which are submitted in their Petition.

Whether or not the Quiet Title Act forbids an equitable suit for reformation, designed to remove cloud on title, may be disposed of quickly. The 1972 enactment, 86 Stat. 1176 (1972), was expressly designed to permit equitable actions to quiet title. There is no provision in the act which specifically defines any exclusive remedy. Reference is made only to actions "to quiet title to an estate or interest in real property" [28 U.S.C. §§ 1346 (f); 1402(d)] and to actions "to adjudicate a disputed title to real property" [28 U.S.C. § 2409a(a)]; and it was specifically observed in the legislative history[4] that the

4. "As was observed in the executive communication transmitted to the Congress by the Department of Justice, individual citizens are presently unable to bring an action to quiet title in which the United States can be joined as a party defendant. The doctrine of sovereign immunity presently prevents suits of this type from being brought against the United States. The history of this type of action goes back to the Courts of England. Suits to quiet title or to remove a cloud on title originated in the equity court of England. They were in the nature of bills *quia timet*, which allowed the plaintiff to institute suits when an action would not lie in a court of law. For instance, a plaintiff whose title to land was continually being subjected to litigation in the law courts could bring a suit to quiet title in a court of equity in order to obtain an adjudication of title and relief against further suits. Similarly, one who feared that an outstanding deed or other interest might cause a claim to be presented in the future could maintain a suit to remove a cloud on title. Under old English practice, the plaintiff in such suits was required to be in possession, and the usual grounds of equitable jurisdiction (an imminent threat and an adequate remedy at law) had to be present."
[1972] U.S. Code Cong. & Ad. News, 4551 (92d Cong. 2d Sess.).

quiet title action originated in the English equity courts. Clearly, the specific purpose was to authorize *equitable* actions concerning land; and as set forth in our Petition, this purpose is entirely consistent with the purpose of the 1976 Amendment, which also authorized *equitable* proceedings. Moreover, the section[5] which specifically set forth the actions to which the statute did *not* apply concerned prior consent statutes, and did *not* mention reformation as an excluded action, and did *not* limit the type of equitable actions which might be brought.

Clearly a suit to quiet title is an equitable proceeding. *Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F.2d 705 (5th Cir. 1951); 74 C.J.S. *Quieting Title*, § 1, p. 10; and reformation the effect of which is to remove cloud on title is equally clearly an equitable proceeding. *Walden v. Skinner*, 101 U.S. 577, 25 L.Ed. 963 (1879); *Ivinson v. Hutton*, 98 U.S. 79, 25 L.Ed. 66 (1878). There is no incompatibility, therefore, in the nature of the relief sought here and that authorized by Congress in the Quiet Title Act. As a result, there is no reason why the 1976 Amendment to the Administrative Procedure Act should not be applicable, authorizing, as it does, *equitable* actions against the Government.

The effort here by the Government, as with so many prior efforts, is once against to seek a "strict" construction of consent statutes, notwithstanding the clear mandate of

5. 28 U.S.C. § 2409a(a), referring to Title 28, §§ 1346, 1347, 1491 and 2410, which were consent statutes relating to tort claims and to certain actions under the Internal Revenue Code, partition actions, Court of Claims actions relating to land, and to actions involving property where the United States claims a mortgage or other lien; and Sections 7424, 7425 or 7426 of the Internal Revenue Code, relating to tax liens; and to Title 43, § 666 relating to actions for the adjudication of water rights.

the 1976 Amendment. The obvious, and correct, construction of the limitation in Section 702[6] relied upon by the Government, that nothing in the 1976 Amendment "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" is simply that such limitation is not to be strictly construed in favor of the Government. Thus, if the language of a particular consent statute may be construed in such a way as to allow an action, or if an exclusive remedy expressed therein may be construed in such a way as not to forbid an action, such constructions *must be adopted.*

MISCONCEPTION NO. 2

The Government, in its effort to isolate the 1961 deed, is saying, on the one hand, that when it suits the Government's purpose to be treated as a sovereign, it will plead as a sovereign, and, on the other hand, when it suits the Government's purpose to be treated as an individual, it will plead as an individual. But in seeking to have the 1961 deed construed within its four corners (as in an action involving individuals), the Government very conveniently overlooks the fact that it *is* a government, existing under and subject to certain restrictions to which individuals are not subject.

"Every acquisition, holding or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power." United States v. Allegheny County, 322 U.S. 174, 182, 64 S.Ct. 908, 88 L.Ed. 1209 (1944). An equally basic corrolary to such principle is that governmental officers and agencies may not

6. For full text of Section 702, see Appendix IV to Petition, page 54 (5 U.S.C. § 702).

act in excess of express statutory authority or agency guidelines. It therefore clearly follows that the agency guidelines must be read in conjunction with the 1961 deed, and if the deed is shown to be in excess of authority, it must either fall or be reformed.

Moreover, as a question of notice, the 1961 deed could not place Petitioners on notice of the claim of the United States in 1961 because it is presumed that the Corps of Engineers acted within its authority as expressed by the agency guidelines setting forth the 179-foot level as the measure of the power to acquire. *Federal Communications Commission v. Schreiber,* 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965). Petitioners were entitled to rely upon that presumption until the contrary became apparent, which did not occur until 1973 with the resurvey work of Petitioner Hart. Prior to such time Petitioners neither knew nor should have known that the acquisition by the United States was in excess of established authority, and that therefore its "claim" extended to more than was intended by the parties. The "mistake" was clearly shown. Reformation was therefore appropriate.

CONCLUSION

The Government has not demonstrated any basis on which the decision of the Court of Appeals may be supported. The passage of the 1976 Amendment is a landmark in American jurisprudence. The effect of such amendment on the construction of consent statutes and other statutes defining the relationship between the Federal Government and the citizens of this nation is at least as important as *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The

petition for writ of certiorari to review these vitally important questions of federal law should be granted.

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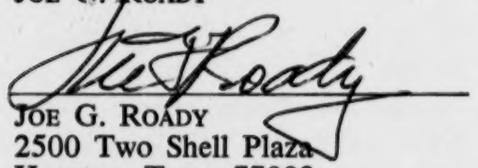
By: 
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CERTIFICATE OF SERVICE

I certify that copies of the Brief of Kirby Forest Industries, Inc. and Andrew P. Hart in Response to the Brief of the United States in Opposition, to the United States Court of Appeals for the Fifth Circuit have been served upon counsel by placing same in the United States mail, postage prepaid, and properly addressed, this 13th day of June, 1979, to:

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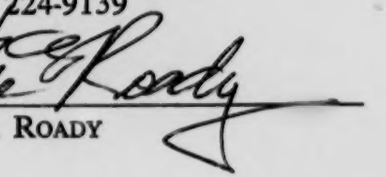
By: 
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